United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

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Date:01/29/98
Case No. 95 INA 485

In the Matter of:

UNIVERSITY OF MASSACHUSETTS AT BOSTON,
Employer,

On behalf of:

SEDIGHEH MOOSAVIFARD,
Alien.

Appearance: F. C. Hite, Esq., of Boston, Massachusetts.

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of SEDIGHEH MOOSAVIFARD (Alien) by UNIVERSITY OF MASSACHUSETTS AT BOSTON (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer (CO) of the U. S. Department of Labor at Boston, Massachusetts, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On March 21, 1994, the Employer, University of Massachusetts at Boston, filed for labor certification on behalf of the Alien, Sedigheh Moosavifard, to fill the position of Systems Manager. AF 180-184. The Employer required one year of experience in the job offered and a college degree in computer science. The job also required proficiency as a VMX system manager, and experience that included the following:

> use of VMX databases and files (e.g. SYSUAF, QUOTA.SYS, MODPARAMS, Error Logs, VMSMAIL PROFILE, et.); installation/ maintenance of VMS/layered products; all VMS utilities; backup and restore procedures; VMS security monitoring; filed service interaction; configuring disks/tapes, printers, file servers; performance reporting/evaluation.

The Employer further required "knowledge of" computer technology that encompassed:

> demand printing, cluster quorum with quorum disk, create/ control batch/print queues, create special forms, DCL programming including system start-up/shutdown procedures, DECnet Phase IV node management, TCP/IP, Domain Name Service and general Unix network diagnostic tools.

In addition, the job required one year of documented experience and proficiency in heterogenous cluster operations; maintaining non-VMS minicomputer or mainframe, IBM or UNIX preferred; the ability to write and speak clearly and concisely. Finally, the Employer demanded a thorough knowledge of FORTRAN, C, PASCAL, or BLISS and the ability to program in at least two of these software languages. AF 184.

In a supplementary document the Assistant Director of Computing services explained that Item #13 describes the functions of a fully qualified Systems Manager at this site, adding that it reflects the knowledge required to "manage VAX clusters and the systems resident on those clusters." At some sites, however, the Assistant Manager conceded that those tasks may be distributed to

multiple staff, adding, "[B]ut we do not have the positions available to follow that model. Therefore, our Systems Manager must perform all the tasks listed." AF 174.[2]

After the Employer received applications from six U. S. workers in response to its recruiting effort, the Employer reported on August 25, 1994, that it rejected four applicants because they did not have a bachelor's degree in computer science and two applicants because they did not meet the experience requirements. AF 45.

Notice of Findings. In the February 16, 1995, Notice of Findings (NOF) the CO found that Employer's wage offer was below the prevailing wage in the area of intended employment. The CO noted Employer had submitted a letter from Richard P. Barry, Associate Director of Computing Services for the Employer. This letter attempted to justify the wage offered but it failed to provide a pay scale as requested by the state Department of Labor. The CO explained that the Employer must provide a letter from the union to demonstrate the wage range for the position of systems manager, apparently being unwilling to credit the evidence of the Employer on this point.

The CO found that the actual requirements for this position were confused. The CO directed the Employer to explain whether an applicant could gain the knowledge required for this position through experience as a VMS systems manager or as a general systems manager.

The CO required the Employer to submit proof that a worker could perform the work of this job adequately without excessive qualifications and to show that it had not previously hired workers with qualifications less than those of the Alien for the same or a similar position. The CO said the application for alien employer certification cannot include as a job requirement experience gained by the alien in that occupation while working for the employer. Then the CO pointed out that this Alien's statement of qualifications indicate that before she worked on the job the Alien lacked the minimum requirements that Employer stated in its application for her certification. The CO explained that before being hired as Employer's Systems Manager the Alien did not meet Employer's requirement of one year's experience with proficiency as a VMS system manager. The CO then noted the more extensive requirements for the job, as set forth

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[2]This staffing problem was more fully discussed in that official's letter of May 5, 1994, regarding the availability of funds to pay the salaries of the highly skilled employees of this State University. He observed that Employer's staffing difficulties are exacerbated by "budget shortfalls," which had caused it to suffer Reductions in Force, adding that the Employer expected similar losses in the forthcoming fiscal year. AF 71-72.

above, and directed the Employer to provide documentation to illustrate the Alien's experience in each of the areas where it required U. S. applicants to qualify.

The CO further noted that the Employer's hiring criteria stated abnormal job requirements that were unduly restrictive. The CO explained that there was no evidence of record that such unduly restrictive job requirements arose from the business necessity of the Employer. The CO then observed that Employer must show how the specific skills it designated relate to the business of the Employer and how the worker's lack of knowledge of these specific programs would be detrimental to the business of its computer system's management unit.

The CO further noted the Alien's employment with Employer since August, 1987 and the Employer's admission that the Alien "has participated in the evolution of our computing facilities, has successfully completed a rigorous formal training program, and has spent countless additional hours on her own time improving her skills." The CO inferred from such representations that the Employer wishes to obtain the Alien for employment because of her proven aptitude and reliability in the position. While the Employer's objective was understood, the CO said, it is not consistent with either the regulations implementing alien labor certification or with the legislative purpose of the provisions of the Act that authorize certification. For this reason, said the CO, unless the Employer can establish that these restrictive job requirements actually rise from business necessity, they must be deleted from its job offer.

Finally, noting the regulations that require the job be open to qualified U.S. workers, the CO observed that Employer's letter in support of its application strongly suggested that the Alien's experience with Employer made it impossible to replace her. The CO explained that this is a strong indication that the positon is not open to qualified U. S. workers, but only to the Alien. As a result, the CO siad, the Employer must provide evidence that this is a bona fide job that is separate and apart from the position the Alien was hired to fill with fewer qualifications than the job now requires. In addition, the CO added, Employer must also identify and provide evidence of the qualifications of its employee who performed these tasks before the Alien washired. AF 29.

Rebuttal. As the Employer's rebuttal, on March 6, 1995, it submitted a statement by the president of the local chapter of the Service Employees International Union, Local 509, that the Alien's salary was in accordance with the provisions of the

current union agreement. AF 17.[3] In another letter, Employer's Assistant Director of Computing Services explained why experience with the VAX system was necessary for this position. He said the job description encompassed all of the tasks that the VAX Systems Manager would perform in the job, and added that proficiency with the WANG or IBM Operating Systems would not qualify a systems manager, as the position also requires skill in the VMS Operating System.

Mr. Barry, who was the VAX Systems Manager as part of his duties as the Associate Director of Computing Services before the Alien was hired, then related the history of the position at issue. Observing that the Employer initially used a search committee to fill this professional staff position, he said that the Employer has a "pro-active" Affirmative Action Office. As a result, when the search for a VAX Systems Manager failed in 1987, a computer operator was trained to perform the job duties of this position. At that time, Mr. Barry said, the Employer was able to train an applicant because its computer business applications were not "ported" to the VAX computer system. Due to the rapidly changing technology, he said, the job is far more complicated and demanding at the present time than it was in 1992, when it hired the Alien as the systems manager. At one point Mr. Barry said it is "unfeasible to replace the Alien," and at another point he said that it is "unfeasible today to hire a person with the skills needed [as compared with Employer's situation] in 1992, when the Alien was hired." AF 14.

Final Determination. On March 21, 1995, the CO addressed the Employer's rebuttal evidence of the Alien's qualifications in the Final Determination. The CO then noted that Employer's rebuttal was based on its contention that,

> Ms Moosavifard clearly possesses far more than the basic requirements listed in the position description. The proof of that is clear; our central computing facility has, in my opinion, the best record of any in both the public and private sectors. This is a direct result of Ms. Moosavifard's ability, dedication experience, and character.

The CO concluded that Employer had failed to establish that she was qualified for the position at issue because it had used such vague terms as these to state the Alien's qualifications to perform the duties required, notwithstanding the lengthy and highly explicit job description set out in Employer's application

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[3]AF 73-AF 171 (98 pp) appears to be the entire text of the "Agreement Between the Board of Trustees of the University of Massachusetts on Behalf of the Board of Regents of Higher Education and the Professional Staff Union, Local 509, Service Employees International Union, AFL/CIO/CLC," for the period from July 1, 1991, through June 30, 1993.

for alien labor certifiction.

The CO first reiterated the regulatory language requiring Employer to prove (1) that its requirements for the job are the actual minimal requirements of the position, and (2) that the Employer has not hired workers with less training or experience or that it is not feasible to hire workers with less training or experience than the level required by the job description in the Employer's application. The CO then said the Employer's evidence had failed to establish that a worker without these apparently excessive qualifications could not perform this job adequately, and that it had not previously hired workers with qualifications inferior to the Alien's qualifications to perform the duties of this or a similar position. AF 11.

Appeal. On April 13, 1995, Employer appealed from the denial of labor certification, with which it submitted a brief and an additional statement by Mr. Barry. AF 02.[4] Reconsideration was denied on April 28, 1995, as Employer had not raised any issues that could not have been raised on rebuttal, and this matter was then referred to the Board. AF 01.

Discussion

20 CFR § 656.21(b)(5)[5] requires the Employer to prove that its hiring criteria are the actual minimum requirements for the position, and (1) that the Employer has not hired workers with less training or experience for the position at issue, or (2) that it is not feasible for the Employer to hire workers with less training or experience to perform the duties of the job it is offering.

Although the Employer argued that its requirements for the position are the minimum required, it nevertheless conceded that the Alien was hired with less experience than its application for labor certification requires. Employer contends, however, that it now is not feasible to hire a worker with less experience because the job increased in complexity after it hired the Alien, and that it does not have the funds to train a worker with job qualifications similar to the Alien's qualifications at the time that the Employer hired her.

Based on the Employer's statements, it is inferred that the Alien is the first worker it ever hired as its systems manager.

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[4] Mr. Barry's statement was dated April 12, 1995. This filing also included Employer's request for reconsideration of the denial of certification and, in the event relief was not granted on reconsideration, it appealed to BALCA.

[5] The regulations regarding actual minimum requirements were recodified from 20 CFR § 656.21(b)(6) to § 656.21(b)(5) by the 1990 amendments to the Act.

Before Employer hired the Alien, the Associate Director of Computing Services performed the job duties it now has assigned to the systems manager in addition to his other job duties. As Employer concedes that it hired the alien with less experience than is now required, the second prong of Section 656.21(b)(5) shall be considered and the Employer must prove that it is not feasible to hire workers with less training or experience than it now requires. An employer's burden to prove that it is not now feasible to offer the same favorable treatment to U. S. applicants is "heavy." **58th Street Restaurant Corp.**, 90 INA 058 (Feb. 21, 1991). Moreover, an employer's burden requires it to prove that no longer is feasible to provide training that it formerly provided to the alien. **California-Nevada Annual Conference of the United Methodist Church,** 88 INA 364 (June 28, 1988).[6]

The Employer argues that its computer systems have become more complex than they were at the time the Alien was hired due to the rapidly changing technology, and that the growth in its computer system, which now includes business applications, precludes such training. BALCA has long held that an increase in the volume of business or in an employer's general growth and expansion is not by itself sufficient to establish infeasibility. Unless Employer proves otherwise, increased training capability is presumed to accompany the increased size of its business. Similarly, changes in technology are not by themselves sufficient to establish the infeasibility of training. **Super Seal Manufacturing Co.**, 88 INA 417 (Apr. 12, 1989)(en banc).

The Associate Director of Computing Services argues without supporting evidence that budgetary constraints imposed on this state owned and operated school would prevent it from training a U. S. applicant whose qualifications were similar to those of the Alien at the time that she was hired. Employer's status as an arm of the state government with concomitant budget constraints does not alter its obligation to prove its case with credible evidence. On the other hand, it lends greater weight to the consideration that the state appropriating authority's provision of expansion funds reasonably anticipated orderly growth, and that the funds appropriated also included a provision for the training of workers Employer would hire to implement the growth that was duly authorized. In any event, the argument relying on the Employer's helplessness in the face of a force majeure is not persuasive because the Employer's assertions are vague and demand unwarranted acceptance of its unsupported assumptions without the

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[6]While an employer may offer proof of the infeasibility of training by showing a change in economic circumstances, that is not the only available means of demonstrating infeasibility. The effective standard of proof is that employer must establish a change in circumstances that is sufficient to demonstrate infeasibility. **Rogue and Robelo Restaurant and Bar**, 88 INA 148 (Mar. 1, 1989)(en banc).

foundation of either reason or evidence. At the best, the Employer's evidence simply supports the assertion that many changes have taken place in computer technology since the time the Alien was hired, and that the Employer's computer system has grown with those changes. The Employer failed, however, to show why those changes prevent it from training a U. S. worker with qualifications similar to the Alien's qualifications at the time the Employer hired her for this job.[7]

As a consequence, we agree with the CO's finding that this Employer did not meet its burden of proving the infeasibility of providing to a U. S. worker the same training that it provided to the Alien, as the Employer failed to present specific evidence that such a budgetary limitation does in fact exist. It follows that the CO's denial of alien labor certification was well-supported by the greater weight of the evidence of record.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of Employer's application for alien labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

[7]The Employer now contends that the Board should consider the added statement by its Associate Director of Computing Services, which it submitted with the request for reconsideration. As the CO considered this evidence before deciding that the motion for reconsideration would be denied, we gave appropriate weight to his remarks in reaching a conclusion. **Construction and Investment Corp.**, 88 INA 055 (Apr. 24, 1988)(en banc). The statement gave some support to Employer's assertion that its computer center has experienced changes in technology and growth in operation after the Alien was hired. It did not demonstrate that its growth in size and the changes in its computer technology would prevent Employer from training a U. S. worker with qualifications similar to those of the alien at the time she was hired for this position, however.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within twenty days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within ten days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No. 95 INA 485

UNIVERSITY OF MASSACHUSETTS AT BOSTON, Employer,
SEDIGHEH MOOSAVIFARD, Alien.

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

At the request of Judge Holmes this matter has been reexamined and corrections and changes to the original draft have been considered. I do not change my position. Subject to the vote of the panel, please return as soon as possible with your approval or dissent. FDN

Thank you,

Judge Neusner

Date: October 29, 1997